

SERVICE DATE - APRIL 11, 1997

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

Finance Docket No. 31989

THE ELK RIVER RAILROAD, INC.--CONSTRUCTION AND  
OPERATION EXEMPTION--CLAY AND KANAWHA COUNTIES, WV

Decided: April 1, 1997

By decision served May 28, 1992,<sup>2</sup> the ICC conditionally granted an exemption under 49 U.S.C. 10505 from the prior approval requirements of 49 U.S.C. 10901 for the Elk River Railroad, Inc. (ELR) to construct and operate a 30-mile line of railroad from Hartland to Falling Rock, in Clay and Kanawha Counties, WV, subject to the completion of an environmental review of the proposal. The environmental review was conducted and, in a decision served September 5, 1996, the Board adopted the mitigation measures recommended by its Section of Environmental Analysis (SEA) based on its environmental review and imposed them as conditions to the exemption. The exemption, as conditioned, became effective on September 15, 1996. On September 26, 1996, Evelyn A. Robertson, Mayor of the Town of Clendenin, WV (the Mayor), filed a petition for revocation<sup>3</sup> of the exemption.<sup>4</sup> On January 30, 1997, ELR filed a reply.<sup>5</sup> We will deny the petition for revocation.

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<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10901. Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

<sup>2</sup> Notice was published in the Federal Register on May 29, 1992 (57 FR 22828).

<sup>3</sup> Although the Mayor styled her pleading as a "petition for reconsideration," the proper remedy to reconsider a grant of authority made pursuant to an exemption, as here, is a petition for revocation of that authority under 49 U.S.C. 10502(d). Accordingly, the Mayor's petition will be so treated.

<sup>4</sup> Comments in support of the Mayor's petition were received from numerous citizens of Clay and Kanawha Counties.

<sup>5</sup> On February 3, 1997, the Mayor replied to ELR's filing. The Mayor's filing is in essence a reply to a reply, which is prohibited under 49 CFR 1104.13(c). However, we will construe our rules liberally here in the interest of making an informed decision on a complete record, and we will accept the Mayor's filing. Our acceptance of this pleading will not unduly broaden the issues in any significant respect.

## BACKGROUND

A notice of intent to prepare an environmental impact statement and to hold public meetings for this proceeding was published in the Federal Register on May 6, 1994. The notice was also published in local newspapers. The notice requested comments in writing or orally at public scoping meetings that were held in Clendenin and Clay, WV, on May 31 and June 1, 1994, respectively. Over 100 parties provided comments and/or attended the meetings. Based on the oral comments from the meetings and written comments received, SEA developed a final statement of the scope of the study of environmental impacts and published a notice of it in the Federal Register on August 2, 1994. The complete statement of the scope of the study was served on all parties to this proceeding and to anyone else who requested a copy.

SEA prepared a Draft Environmental Impact Statement (DEIS) based on the final scope of study and served it on the parties on June 30, 1995. SEA received 13 sets of comments on the DEIS from 11 parties.<sup>6</sup> SEA issued a Final Environmental Impact Statement (FEIS) on August 9, 1996. The FEIS discussed the comments received and was placed in the formal docket. SEA concluded that the proposed action would have adverse noise and safety impacts due to the close proximity to the rail line of churches, schools and a substantial number of residences. SEA recommended that 32 mitigation measures be imposed, and concluded that the proposals would reduce, but not totally eliminate, the environmental impacts. As stated, these measures were imposed in a decision served September 5, 1996, to which decision the Mayor filed the instant petition.

On petition, the Mayor requests the Board to reconsider the construction exemption on grounds that the agency did not consider how the construction proposal would affect the town of Clendenin. Among the specific objections raised are: (1) possible safety hazards to persons; (2) generation of noise and air pollution; (3) delay of fire trucks and emergency vehicles at railroad crossings; (4) loss of park, recreation and school areas; (5) loss of parking facilities; and (6) decrease in property values.

In reply, ELR argues that the Board fully considered the impact of this proposal on Clendenin. Specifically, the railroad submits that proper notification of the proposal was given the public via notices and advertisements in the press. ELR adds that public meetings were conducted and were well attended by citizens who live in the vicinity of the railroad and by town officials of Clendenin. ELR points out that the citizens who expressed interest in the project, along with Clendenin officials, received copies of the DEIS and were asked to provide comments to the ICC/Board. ELR states, in addition, that all required regulatory agencies were contacted by SEA about the project so as to provide comments, and that all of the agencies received copies of the DEIS for their final input prior to the final decision by the Board. ELR argues that the Mayor's petition has no merit because all of the concerns raised therein were previously raised and addressed in the mitigation conditions. Finally, ELR avers that it is working with the Mayor and town officials to ensure that all of the conditions are met.

## DISCUSSION AND CONCLUSIONS

To warrant revocation of an exemption, in whole or in part, a petitioner must show that regulation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101a. Thus, the statutory standard for revoking an exemption is whether regulation is needed to carry out that policy. Under this standard, we evaluate revocation petitions to correct demonstrated abuses. The party seeking to revoke the exemption has the burden of proof, and a petition to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and

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<sup>6</sup> Comments were received from: (1) U.S. Environmental Protection Agency; (2) U.S. Army Corps of Engineers; (3) West Virginia Division of Natural Resources; (4) Gary Stuber, Procious, WV; (5) Stephen Chambers, Charleston, WV; (6) Gregg Brewer, Dunbar, WV; (7) April Coleman, Charleston, WV; (8) J.L. Mangus, Charleston, WV; (9) W.H. Minsker, Procious, WV; (10) Roger Jividen, Hurricane, WV; and (11) Jennie Jividen, Hurricane, WV.

regulation of the transaction is necessary. CSX Transp., Inc.-Aban.-In Randolph County, WV, 9 I.C.C.2d 447, 449 (1992).

Upon review of the petition before us, we conclude that a case has not been made for revocation. The safety and environmental issues raised on petition are the same concerns raised at the public meetings held in Clendenin and Clay on May 31 and June 1, 1994. Further, these concerns were thoroughly considered by SEA during an extensive review process and were addressed by the imposition of 32 separate environmental conditions<sup>7</sup> on the grant of authority.

In the May 28, 1992 decision in this matter, we found that a grant of this exemption would promote a number of rail transportation policy goals and adversely affect none. Nothing in this petition for revocation leads us to conclude otherwise. Petitioner has simply failed to show that regulation of this transaction is necessary to carry out the rail transportation policy. Accordingly, we will deny the petition.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for revocation is denied.
2. This decision is effective on the service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary

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<sup>7</sup> Areas covered by the conditions include: land use; water resources/erosion control; transportation/safety; hazardous materials and hazardous waste; air quality; noise; cultural resources; and recreation resources.